BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ELAYNA G. DUNCAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,049,430
LARRY BUDS SPORTS BAR	)	
Respondent	)	
AND	)	
	)	
KANSAS RESTAURANT	)	
& HOSPITALITY ASSOCIATION	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the April 8, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

In the April 8, 2010 preliminary hearing Order, the ALJ found claimant engaged in horseplay and, thus, failed to sustain her burden of proof that she suffered a personal injury by accident arising out of and in the course of her employment with respondent. The ALJ denied claimant's requests for temporary total disability benefits, authorized medical treatment and payment of an emergency room medical bill.

The claimant alleges that she was performing her job as a bartender when she jumped over the bar to engage in friendly banter with a customer. Claimant contends that friendly banter is a regular occurrence between staff and customers and, as such, her right knee injury arose out of the nature, conditions and incidents of her employment. Accordingly, claimant argues her injury is compensable and medical treatment and temporary total disability benefits should be awarded.

Respondent and its insurance carrier (respondent) request the Board affirm the ALJ's April 8, 2010 preliminary hearing Order and deny claimant benefits.

The issue is:

- Whether claimant suffered personal injury by accident that arose out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

It is undisputed that on January 20, 2010, claimant was working as a bartender for the respondent. It is also undisputed that sometime between 10:30 or 11 p.m. and midnight she jumped over the bar and injured her right knee.

What precipitated the claimant jumping over the bar is less clear. Claimant testified that she had been joking with a customer, Mr. Parkhurst, about the strength of his mixed drink.[1] Sometime during that playful banter, she threw a water wad at the customer. Eventually, the customer said something akin to "bring it on." At that time, claimant jumped over the bar and injured her right knee.[2]

Mr. Parkhurst testified that he and the claimant were joking around when the claimant threw a water wad at him. In response to the water wad, he stood up and said "bring it on"[3] and then claimant hopped over the bar. Mr. Parkhurst also testified that the playful banter between claimant and himself was not about a drink.[4] He also thought claimant was coming across the bar to just "mess with [him]."[5]

Mr. Parkhurst received a text message from the claimant shortly after she was deposed for this claim.[6] Exhibit 1 of Mr. Parkhurst's deposition is the photographed text message, which is somewhat difficult to read. The text message appears to state: "Larrys gona ask u wat happend btween us the nite i hurt my knee. I told them I was cumin 2 get

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[1] P.H. Trans. at 8.

[2] *Id.*

[3] Parkhurst Depo. at 7.

[4] *Id.*, at 9.

[5] *Id.*, at 14.

[6] *Id.*, at 12.

ur drink cuz it wasnt strng enuf. [C]an u plz agree wit[h] that?".[7] Mr. Parkhurst did not reply to the text message.

Elizabeth Redlinger, one of respondent's servers, observed the banter between Mr. Parkhurst and the claimant. She testified that the banter had nothing to do with work and that claimant was "flat out just messing around."[8]

At respondent's business, it was customary that servers would serve drinks to customers who were not sitting at the bar. On January 20, 2010, Mr. Parkhurst and his friends, who were seated at a table, had a server assigned to their table.[9]

K.S.A. 2009 Supp. 44-501(a) states, in part:

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

Arising "out of" the employment is defined as follows:

> An injury arises 'out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises 'out of' employment if it arises out of the nature, conditions, obligations and incidents of the employment.[10]

The Kansas Supreme Court has held that, for an accident to arise out of the employment, some causal connection must exist between the accidental injury and the employment.[11]

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[7] *Id.*, Ex. 1. See also *id.* at 11-12.

[8] Redlinger Depo. at 11.

[9] Duncan Depo. at 21.

[10] *Newman v. Bennett,* 212 Kan. 562, 512 P.2d 497 (1973).

[11] *Siebert v. Hoch*, 199 Kan. 299, 428 P.2d 825 (1967).

Injury caused by horseplay does not normally arise out of employment and is not compensable. But if it is shown that the horseplay has become a regular incident of the employment and is known to the employer then injuries suffered in such activities are compensable.[12]

Claimant contends she was performing her job as a bartender when she jumped over the bar to engage in friendly banter with a customer. Further, claimant argues that friendly banter is the type of activity that draws crowds to the respondent's bar and it is expected.

The claimant's argument is not convincing. While a little friendly banter is expected in a bar, a bartender jumping over the bar to engage in such banter with a customer is unusual and unreasonable and cannot be considered an incident of employment. Claimant even admits that it is common sense that employees should not be crossing the bar.[13] Arguably, a bartender's duties would include preparing drink orders for servers to serve and serving drinks to customers sitting at the bar. Neither of those responsibilities would appear to require or include jumping over the bar.

Claimant also argues that *Robinson*[14] is on point and, as such, the claimant's injury is compensable. In that case, Robinson injured herself when she kicked a chair to move it and fell. The evidence showed Robinson had to move the chair to shut a door to secure respondent's premises and that Robinson was performing a required task incidental to her work when the accident occurred. A member of this Board found Robinson established she suffered accidental injury arising out of and in the course of her employment and reversed the administrative law judge's Order denying Robinson's request for benefits. The instant case is distinguishable from *Robinson*. As indicated above, it does not appear the claimant was required to jump or climb over the bar to perform her duties as a bartender. In addition, the claimant implies she jumped over the bar to accommodate a customer's concern about a mixed drink. Other witnesses to the incident consistently testified that the banter was not about drinks. The claimant's description of the circumstances surrounding the accident is less than credible.

This Board Member finds and concludes that the credible evidence shows that claimant was engaging in horseplay when she was injured. Consequently, her injury did

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[12] See *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966), and *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 P. 372 (1919).

[13] Duncan Depo. at 31.

[14] *Robinson v. Topeka Shawnee Co. Library*, No. 1,034,860, 2007 WL 3348548 (Kan. WCAB Oct. 30, 2007).

not arise out of and in the course of her employment with the respondent and is not compensable.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the April 8, 2010 preliminary hearing Order of ALJ Nelsonna Potts Barnes is affirmed in its entirety.

IT IS SO ORDERED.

Dated this ____ day of June, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[15] K.S.A. 44-534a.